IN THE

Supreme Court of the United States

October Term, 1979

No. 79-5932

JOHN DOE AND JANE ROE,

Appellants,

v.

THE STATE OF DELAWARE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF DELAWARE

BRIEF FOR THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK, JUVENILE RIGHTS DIVISION, AS *AMICUS CURIAE*

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TABLE OF CONTENTS

PAGE

Interest of *Amicus Curiae* 1

Statement of the Case 3

Summary of Argument 4

ARGUMENT:

I. Proceedings to Terminate Involuntarily the Parent-Child Relationship Impinge upon a Constitutionally Protected Liberty Interest of the Child That Can Only Be Effectively Guaranteed by Separate and Independent Counsel 7

II. Involuntary Termination of the Constitutionally Protected Parent-Child Relationship Constitutes Such a Severe Deprivation of Liberty That Due Process Requires That the Basis for Termination Be Proven by Clear and Convincing Evidence 15

III. The Delaware Statute Allowing Termination of Parental Rights on the Grounds of Unfitness and Best Interests of the Child Is Unconstitutionally Vague and Overbroad 20

CONCLUSION 27

TABLE OF AUTHORITIES

Cases:

A.B. Small v. *American Sugar Refining Co.*, 267 U.S. 233 (1925) 21

Addington v. *Texas*, 441 U.S. 418 (1979) 15, 16, 16n, 17, 18

PAGE

In re Adoption of J.S.R., 374 A.2d 860 (D.C. 1977) 17n
Alsager v. *District Court of Polk County, Iowa*, 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd as modified*, 545 F.2d 1137 (8th Cir. 1976) 9, 13, 16, 17, 22, 22n, 24
In re Angelia M.P., [1980] 6 Fam. L. Rep. (BNA) 2490 (Cal. Ct. App. May 1, 1980) 9, 17, 18n
Armstrong v. *Manzo*, 380 U.S. 545 (1965) 14

Baggett v. *Bullit*, 377 U.S. 360 (1964) 23n
Bellotti v. *Baird*, 443 U.S. 622 (1979) 12, 12n
Blakey v. *Blakey*, 72 Ill. App. 3d 946, 391 N.E.2d 545 (App. Ct. 1979) 9, 16
Breed v. *Jones*, 421 U.S. 519 (1975) 9-10
Brown v. *Guy*, 476 F. Supp. 771 (D. Nev. 1979) 8, 9n

In re Carmelita B., 21 Cal.3d 482, 579 P.2d 514, 146 Cal. Rptr. 623 (1978) 25n
In re C.L.T., 597 P.2d 518 (Alaska 1979) 16
In re Chad S., 580 P.2d 983 (Okla. 1978) 9n
Chaunt v. *United States*, 364 U.S. 350 (1960) 18n
Cleaver v. *Wilcox*, 499 F.2d 940 (9th Cir. 1974) 9n
Coates v. *City of Cincinnati*, 402 U.S. 611 (1971) 23n
Connally v. *General Construction Co.*, 269 U.S. 385 (1926) 21
Corey L. v. *Martin L.*, 45 N.Y.2d 383, 380 N.E.2d 239, 408 N.Y.S.2d 439 (1978) 25n
Cramp v. *Board of Public Instruction*, 368 U.S. 278 (1961) 22

In re D., 24 Or. App. 601, 547 P.2d 175 (Ct. App. 1976), *cert. denied sub nom. C.* v. *F.*, 429 U.S. 907 (1976) 14n
Davis v. *Smith*, 583 S.W.2d 37 (Ark. 1979) 22, 23, 24, 25
In re Dingee, 328 A.2d 139 (Del. 1974) 20
Duchesne v. *Sugarman*, 566 F.2d 817 (2d Cir. 1977) 8

PAGE

In re Fish, 569 P.2d 924 (Mont. 1977) 25n
In re Five Minor Children, 407 A.2d 198 (Del. 1979) ..20, 24

In re G.M., [1980] 6 Fam. L. Rep. 2349 (Tex. Mar. 19, 1980) 16, 16n
In re Gault, 387 U.S. 1 (1967) 2, 4, 9, 9n, 10n
Giacco v. *Pennsylvania*, 382 U.S. 399 (1966) 21
Goss v. *Lopez*, 419 U.S. 565 (1975) 9
Grayned v. *City of Rockford*, 408 U.S. 104 (1972) 21, 22, 23n
Griswold v. *Connecticut*, 381 U.S. 479 (1965) 7
In re Guardianship of R., 155 N.J. Super. 186, 382 A.2d 654 (Super. Ct. App. Div. 1977) 17n

In re Hambelton, 2 K.A.2d 68, 574 P.2d 982 (Ct. App. 1978) 17n
In re Heidi T., 87 Cal. App. 3d 864, 151 Cal. Rptr. 263 (Ct. App. 1978) 17
Huey v. *Lente*, 85 N.M. 597, 514 P.2d 1093 (1973) 17n
Hynes v. *Mayor and Council of Oradell*, 425 U.S. 610 (1976) 21, 22, 24

In re J.A., 283 N.W.2d 83 (N.D. 1979) 16-17
In re J.L.B., 594 P.2d 1127 (Mont. 1979) 9, 16, 17
In re Jewish Child Care Ass'n (Sanders), 5 N.Y.2d 227, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959) 13

In re Kelley, 262 N.W.2d 781 (Iowa 1978) 17

In re LaRue, 244 Pa. Super. Ct. 218, 366 A.2d 1271 (1976) 25n
Linn v. *Linn*, 205 Neb. 218, 286 N.W.2d 765 (1980) 22, 23, 24

Mathews v. *Eldridge*, 424 U.S. 319 (1976) 10
Meyer v. *Nebraska*, 262 U.S. 390 (1923) 7

PAGE

Moore v. *Sims*, 442 U.S. 415 (1979) 11, 14n, 17
Morrissey v. *Brewer*, 408 U.S. 471 (1972) 10

New York State Ass'n for Retarded Children v. *Rockefeller*, 357 F.Supp. 752 (E.D.N.Y. 1973) 13n
In re Orlando F., 40 N.Y.2d 103, 351 N.E.2d 711, 386 N.Y.S.2d 64 (1976) 14, 14n

Page v. *Davis*, 442 F.Supp. 258 (S.D. Fla. 1977) 9n
Parham v. *J.L.*, 442 U.S. 584 (1979) 11n, 13n
Planned Parenthood v. *Danforth*, 428 U.S. 52 (1976) 10
Prince v. *Massachusetts*, 321 U.S. 158 (1944) 7

Quilloin v. *Walcott*, 434 U.S. 246 (1978) 24n

In re Raya, 255 Cal. App.2d 260,63 Cal. Reptr. 252 (Ct. App. 1969) 13
Ricketts v. *Ricketts*, 576 S.W.2d 932 (Ark. 1979) 14n
Roe v. *Conn*, 417 F.Supp. 769 (M.D. Ala. 1976) 10n, 14n, 21, 24
In re Rosenbloom, 266 N.W.2d 888 (Minn. 1978) 17
Rose v. *Locke*, 423 U.S. 48 (1975) 24

Sanchez v. *Texas Dept. of Human Resources*, 581 S.W.2d 260 (Tex. 1979) 8
In re Sanjivini K., 47 N.Y.2d 374, 391 N.E.2d 1316, 418 N.Y.S.2d 339 (1979) 25n
Schneiderman v. *United States*, 320 U.S. 118 (1943) 18n
In re Sego, 82 Wash.2d 736, 513 P.2d 831 (1973) 17n
Sims v. *State Dept. of Public Welfare*, 438 F.Supp. 1179 (S.D. Tex. 1977), *rev'd on other grounds sub nom. Moore* v. *Sims*, 442 U.S. 415 (1979) 11, 12, 14n, 17
Smith v. *Goguen*. 415 U.S. 566 (1974) 24

PAGE

Smith v. *Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977) 8, 13, 19, 24n
In re Souza, 204 Neb. 503, 283 N.W.2d 48 (1979) 16
Stanley v. *Illinois*, 405 U.S. 645 (1972) 7-8
Stapleton v. *Dauphen County Child Care Services*, 228 Pa. Super. Ct. 371, 324 A.2d 562 (1974) 14n
State v. *Jamison*, 251 Or. 114, 444 P.2d 15 (1968) 9
State v. *Robert H.*, 20 N.H. 90, 393 A.2d 1387 (1978) 16, 17

Vance v. *Terrazas*, —— U.S. ——, 100 S.Ct. 540 (1980) 18n

Wagstaff v. *Superior Court*, 535 P.2d 1220 (Alaska 1975) 14n
Westerlund v. *Croaff*, 68 Ariz. 36, 198 P.2d 842 (1948) 25n
In re Winship, 397 U.S. 358 (1970) 16n
Woodby v. *Immigration and Naturalization Service*, 385 U.S. 276 (1967) 18n

Statutes:

Ala. Code § 26-14-11 (Ala. Code 1975) 6n

Cal. Family Protection Act of 1976 (1976 Cal. Stats. § 977) 24n

Constitution of the United States
First Amendment 23n
Fourteenth Amendment 4, 7

Del. Code, ch. 13
§§ 1101-13 3
§ 1103(4) 4, 20
§ 1108(a) 4, 20

Indian Child Welfare Act, 25 U.S.C. §§ 1901 *et seq.* (1978) 19n

PAGE

Kan. Stat. §§ 38-817, 38-820, 38-821 (Kan. Stat. Ann. Supp. 1979) 6n

La. Civ. Code Ann. art. 13:1602 (West Supp. 1979).... 6n

N.Y. Fam. Ct. Act § 249 (McKinney Supp. 1976-79) 6

N.Y. Soc. Serv. Law § 384-b (McKinney Supp. 1979-80) 24n

Miscellaneous:

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L. Cole, Our Children's Keepers (1974) 13n

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Day, *Termination of Parental Rights Statutes and the Void for Vagueness Doctrine: A Successful Attack on the* Parens Patriae *Rationale,* 16 J. Fam. L. 213 (1977) 23n

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PAGE

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Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy,* 39 Law & Contemp. Prob. 226 (Summer 1975) 12

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Note, Parens Patriae *and Statutory Vagueness in the Juvenile Court,* 82 Yale L. J. 745 (1973) 21n

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Interest of *Amicus Curiae*

The Legal Aid Society is a private, non-profit legal assistance agency, which since 1876, has sought to provide quality legal representation to persons living in New York City who cannot afford to pay a private lawyer. The Society has a full-time staff in excess of 600 attorneys, who provide assistance to more than 200,000 people a year in all trial courts in New York City, in the state and federal appellate courts and in this Court.

Amicus curiae, the Juvenile Rights Division of The Legal Aid Society, has been in existence since 1962, when the New York State Legislature enacted the Family Court Act and mandated the assignment of counsel in juvenile pro-

ceedings. The Division at present comprises 76 trial, appellate and special litigation attorneys and a social services support staff of 34, including 18 persons with masters degrees in social work, whose primary responsibility is the representation of juveniles who are the subject of Family Court proceedings in New York City.* In 1979, the Juvenile Rights Division lawyers (referred to by state statute as "law guardians") were assigned as counsel in 17,614 proceedings. The cases included juvenile delinquency, abuse and neglect, persons in need of supervision (PINS), special education, violation of probation, extension, termination or transfer of placement within the child care system, family offense, custody and foster care review proceedings, as well as over 700 proceedings involving the termination of the parent-child relationship.

In addition, staff members represent children in a myriad of cases related to but separate from Family Court assignment, and on a daily basis deal with the home life and foster care problems of New York City area children. Charles Schinitsky, who has been attorney-in-charge of the Division since 1962, regularly has been asked to testify at local, state and federal legislative and administrative hearings concerning the care and protection of children. His study of the role of the lawyer in Children's Court was cited by this Court in *In re Gault*, 387 U.S. 1, 37 n. 62 (1967). He has also served on many committees concerned with children's issues, such as the New York State Juvenile Justice Advisory Board, which dealt with the expenditure of funds under the federal Juvenile Justice and Delinquency Prevention Act, the New York City Mayor's Task Force on Child Abuse and Neglect, an advisory committee to the National Council of Juvenile Court Judges, a com-

* The Division makes extensive use of psychiatric and psychological experts as well.

mittee on public and private child care agencies established by New York State's First and Second Judicial Departments, and the Temporary State Commission to Recodify the Family Court Act.

Based upon its experience, *Amicus* has consistently maintained that children have a right to live in their natural homes, that they should be removed from those homes and placed in foster care only as a last resort, and that they should then be returned to their homes as soon as possible. *Amicus* therefore has urged the introduction of extensive community services so that wherever possible children remain at home and will not have to enter the costly foster care system.

The central issue presented in this case—whether the Delaware proceedings to terminate the parent-child relationship are unconstitutional—is obviously of great importance to the thousands of youngsters in New York City represented by the Juvenile Rights Division in such termination proceedings.

Amicus is submitting this brief because of its concern about the impact of this case on its clients. *Amicus*, as the single largest legal representative of children in the United States, wishes to provide this Court with an analysis of the issues from the viewpoint of the child, which may not otherwise be presented, and which *Amicus* believes itself especially qualified to present.

Statement of the Case

The action to terminate the parental rights of John Doe and Jane Roe was initiated in 1975 in the Delaware Superior Court by the Delaware Department of Health and Social Services pursuant to 13 Del. Code §§ 1101-13. The statutory ground for termination asserted was that the

parents were "not fitted to continue to exercise parental rights" to their five children. 13 Del. Code § 1103(4). The Delaware statute further provided that termination must be "in the best interests of the child." 13 Del. Code § 1108(a). Counsel for the parents challenged the constitutionality of the statute based on its vagueness, and the constitutionality of the termination proceeding based on the use of an inadequate standard of proof. The children were not represented by independent counsel, which is not provided for by the Delaware code or case law.

Subsequently, the Superior Court ordered the parental rights of John Doe and Jane Roe terminated on the grounds that Doe and Roe were "incapable of providing proper care to their children" and that termination was in the children's best interests. The Delaware Supreme Court affirmed the order of the Superior Court, and later denied the motion for reargument filed by the parents. Probable jurisdiction was noted by this Court on March 25, 1980. 48 U.S.L.W. 3613 (1980).

Amicus has received consent from both appellants and the appellee to file this brief.

Summary of Argument

This Court has established that "[n]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault,* 387 U.S. at 13. A child has fundamental liberty interests in life and freedom from harm as well as in family integrity. Usually these interests are consonant with the parents' fundamental interest in the preservation of the family's integrity and the parent-child relationship. There are points, however, at which a child's interests potentially diverge from his parents' in a proceeding to terminate parental rights. Once parents are faced with a court pro-

ceeding in which the involuntary termination of their parental rights is at issue, their primary concern is to defend themselves against that loss. This focus may be contrary to the rights and interests of the child.

At the same time, the child's interests do not thereby become identical with the state's. The "best interests of the child" claimed to be protected by the state is not a monolithic entity, but rather is composed of separate rights, at least one of which, the right to family integrity, cannot be adequately represented by the state. By filing a petition to terminate parental rights, the state has committed itself to the position that termination of the family entity is necessary, and thus the state is principally involved in sustaining the allegations of the petition. The interests of the child, however, may lie in remaining with or returning to his family.

In this case, although the central concern of the action is the welfare of five minor children, there has been no representation of their interests independent of the parents' and the state's interests. There should be little dispute that the child has the most at stake in a termination proceeding. It is ironic that the party with the greatest interest in the outcome of the litigation has no voice in the proceeding. *Amicus* maintains that in order for the full panoply of the children's rights to be protected and for the facts to be fairly and fully presented to the fact-finder, independent counsel for the child is required. Independent counsel is in the best position to establish a confidential, trusting relationship with the child and thus to determine and present the child's wishes, concerns, needs and fears. The child's attorney would function as an advocate and fully participate in the litigation.

Independent counsel for the child who is the subject of a termination proceeding is not a theoretical and untested

concept. An estimated thirty-eight states* at present mandate or permit independent representation of the child in a proceeding that may result in the termination of the parent-child relationship. In New York City since 1976, when the state legislature mandated such representation, *see* N.Y. Family Court Act § 249 (McKinney Supp. 1976-79), *Amicus* has represented over 1,500 children in termination proceedings.

Based on its experience, *Amicus* also supports the appellants' claim that clear and convincing evidence should be the standard of proof in termination proceedings. From the child's perspective, the right to family integrity is sufficiently fundamental that only when it has been proved by a more rigorous standard than preponderance of the evidence that his right to life and to freedom from harm are endangered, would the presumption be overcome that his best interests lie in being with his natural family.

For the same reasons, *Amicus* supports appellants' position that the Delaware statute is so unconstitutionally vague that it permits arbitrary, subjective and discriminatory interference in the constitutionally protected parent-child relationship. While no statute terminating parental rights should be so rigid as to specify every detail of required or proscribed behavior, it should, at a minimum, provide notice as to what conduct by the parent will allow the state to file such a proceeding. Further, the Delaware statute is so overbroad as to permit the state to intervene in the family relationship in a manner that is in violation of fundamental constitutional rights.

Therefore, *Amicus* urges this Court to declare the Delaware termination statute unconstitutional, to declare that

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* See *e.g.*, Ala. Code § 26-14-11 (Ala. Code 1975); Kan. Stat. §§ 38-817, 38-820, 38-821 (Kan. Stat. Ann. Supp. 1979); La. Civ. Code Ann. art. 13:1602 (West Supp. 1979).

the Delaware courts used a constitutionally inadequate standard of proof, and to remand this proceeding for a new hearing at which the child's vital interests are represented by independent counsel.

ARGUMENT

I.

Proceedings to Terminate Involuntarily the Parent-Child Relationship Impinge Upon a Constitutionally Protected Liberty Interest of the Child That Can Only Be Effectively Guaranteed by Separate and Independent Counsel.

In any proceeding where the state seeks the involuntary and permanent termination of the parent-child relationship, the child has substantial individual liberty interests in life and freedom from harm, as well as in the preservation of the family relationship. These interests are equal or superior to those of the parent and are equally deserving of constitutional protection. Given the existence of these fundamental interests, the parent-state conflict that enhances the risk for the child of an erroneous determination, and the grievous loss to the child from improper termination, *Amicus* submits that due process requires that the child be afforded separate and independent legal representation.

The integrity of the natural family unit, free from the coercive interference of the state, has consistently been recognized by this Court to be an essential liberty interest protected by the Due Process Clause of the Fourteenth Amendment. *Meyer* v. *Nebraska,* 262 U.S. 390 (1923); *Prince* v. *Massachusetts,* 321 U.S. 158 (1944); *Griswold* v. *Connecticut,* 381 U.S. 479 (1965); *Stanley* v. *Illinois,* 405

U.S. 645 (1972). This right to the enjoyment of familial privacy, which has its source in "intrinsic human rights, as they have been understood in 'this Nation's history and tradition' [cite omitted]," *Smith* v. *Organization of Foster Families for Equality and Reform,* 431 U.S. 816, 845 (1977), encompasses the reciprocal rights of both parents and children. *Duchesne* v. *Sugarman,* 566 F.2d 817, 825 (2d Cir. 1977).

Because parents typically possess the warmth and sensitivity toward their children that make them best suited to the task of child-rearing, it follows that the child is most likely to derive from his natural family the affection, support and protection he requires for positive growth and social adjustment. *Sanchez* v. *Texas Dept. of Human Resources,* 581 S.W.2d 260, 262 (Tex. 1979). The child's interest lies in "not being dislocated from the emotional attachments that derive from the intimacy of daily association with the parent [cite omitted]." *Duchesne* v. *Sugarman,* 566 F.2d at 825. Indeed, a child inappropriately removed from parental custody

> may suffer such serious emotional disturbance and conflict that his ability to function as a normal human being . . . is impaired to such an extent that he can gain no meaningful benefit from his constitutional right to the pursuit of happiness.

Brown v. *Guy,* 476 F.Supp. 771, 773 (D. Nev. 1979).

Thus, to the extent that parents adequately fulfill their obligations to satisfy the child's needs, his interest in family integrity is coterminous with that of his parents. To the extent, however, that parents threaten their children with actual harm, the presumption that the parent-child relationship is transcendant may be overcome.

In so-called "termination of parental rights" proceedings, the state seeks permanently to destroy the parent-child relationship. Indisputably, this action represents one of the most drastic that the state can take against its citizens. *State* v. *Jamison*, 251 Or. 114, 117, 444 P.2d 15, 17 (1968); *In re J.L.B.*, 594 P.2d 1127, 1134 (Mont. 1979); *In re Angelia M.P.*, [1980] 6 Fam. L. Rep. (BNA) 2490, 2491 (Cal. Ct. App. May 1, 1980); *Blakey* v. *Blakey*, 72 Ill. App. 3d 946, 947, 391 N.E. 2d 545 (App. Ct. 1979). The threat of grievous loss occasioned by the state's interference in the constitutionally protected family unit has been held to require the exercise of maximum procedural safeguards. *See, e.g., Alsager* v. *District Court of Polk County, Iowa*, 406 F.Supp. 10 (S.D. Iowa 1975), *aff'd on other grounds*, 545 F.2d 1137 (8th Cir. 1976). For parents, these safeguards have been widely declared to include the right to counsel.*

For children, however, the right to counsel is not uniformly recognized in all jurisdictions. *Amicus* maintains that while the interests of all family members in the preservation of the home may be interwoven, the child's interest should be independently articulated from his unique perspective.

Far from being regarded today as the "property" of his parents, a child is a "person" protected by the Constitution and endowed with constitutional rights. *In re Gault*, 387 U.S. 1;** *Goss* v. *Lopez*, 419 U.S. 565 (1975); *Breed* v.

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* See, *e.g.*, *Cleaver* v. *Wilcox*, 499 F.2d 940 (9th Cir. 1974); *Brown* v. *Guy*, 476 F.Supp. 771 (D. Nev. 1979); *Page* v. *Davis*, 442 F.Supp. 258 (S.D. Fla. 1977); *In re Chad S.*, 580 P.2d 983 (Okla. 1978).

** In *Gault*, this Court recognized the separate liberty interest of a child in a delinquency proceeding as one deserving of constitutional protection, and held that the *parens patriae* model of those proceedings could not justify denying children the right to counsel. That termination proceedings are labelled "civil" rather than "criminal" or "quasi-criminal" should not obscure the fact

Jones, 421 U.S. 519 (1975); *Planned Parenthood* v. *Danforth,* 428 U.S. 52 (1976). Thus, as an individual with a personal stake in the integrity of the parent-child relationship and in his own well-being, the child is constitutionally entitled to no less procedural protection than his parent when the state attempts to intervene in the relationship.

A determination of what process is due depends upon the demands of the particular situation. *Morrissey* v. *Brewer,* 408 U.S. 471, 481 (1972). Apart from the identification of a private interest that rises to the level of a constitutional right, such determination must involve an analysis of the adequacy of existing procedures in protecting the interests affected. *Mathews* v. *Eldridge,* 424 U.S. 319 (1976). In termination proceedings in the State of Delaware, the child, who is the subject of the action, is obliged to accept "joint" representation with either of the other two necessary parties. *Amicus* suggests that due process cannot be achieved by such an arrangement. Only independent counsel for the child can effectively dedicate himself to the sole representation of the child at the fact-finding hearing.

There is a potential for conflict between the interest of the child and those of both the parent and the state that substantially increases the risk of an erroneous determination. Notwithstanding the strong presumption that the natural bonds of affection lead parents to act in the best interests of the child, it is manifest that the parent is incapable of adequately representing his child's interests in termination proceedings. Because the parent stands accused of acts or omissions that threaten the welfare of the

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that the nature of the interest at stake is similar: the child is threatened with removal from his family and possible long-term institutionalization, an "awesome prospect" for non-delinquent as well as delinquent children. *In re Gault,* 387 U.S. at 35. Regardless of the nomenclature employed, the due process analysis is identical. *Roe* v. *Conn,* 417 F.Supp. 769, 780 (M.D. Ala. 1976).

child, a potential conflict is created that weakens the unity of interest between parent and child. Counsel for the accused parent is professionally duty-bound to attempt to refute the charges and to preserve the parent-child relationship for his client, regardless of the interests of the child. Whether or not the child's interest is ultimately determined to reside in the continuation of the natural family relationship, until such determination is made the interests of parent and child remain potentially adverse.*

At the same time, the state is equally incapable of providing the effective representation that the child's interests require. An *ex parte* determination by the state that the natural parents threaten their child's well-being does not create a reverse presumption that the child's ultimate best interest lies in his removal from or the destruction of ties to the natural family unit. To the contrary, the fact that the state seeks the permanent severance of familial bonds in which the child presumptively has a fundamental interest constitutes an obvious conflict. *Sims* v. *State Dept. of Public Welfare,* 438 F.Supp. 1179 (S.D. Tex. 1977), *rev'd on other grounds sub nom. Moore* v. *Sims,* 442 U.S. 415 (1979).

Further, while there may be an appearance of congruity of interest between the state and the child because of the state's recognized right and duty to protect the welfare of its minor citizens, the fact that the termination of a natural parent's rights would make the state the new custodian of the child should immediately indicate the potential for sub-

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* The situation in termination proceedings is readily distinguishable from that in *Parham* v. *J.L.*, 442 U.S. 584 (1979), where this Court held that although the child possessed a substantial liberty interest in not being erroneously institutionalized, there was an *identity* of interest between parent and child in obtaining necessary care and treatment. An adversary precommitment hearing would unduly strain the parent-child relationship and discourage parents from seeking treatment. Here, such a hearing is already a reality, and the parent's and child's interests are potentially adverse.

stantial conflict as well. *Sims* v. *State Dept. of Public Welfare,* 438 F.Supp. 1179. As *parens patriae,* the state lacks both the resources and sensitivity to provide the intimacy, stability and emotional support necessary for the healthy development of individual children. *See Developments in the Law: The Constitution and the Family,* 93 Harv. L. Rev. 1156, 1214 (1980); Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy,* 39 Law & Contemp. Prob. 226, 257-61 n. 102 (Summer 1975); *Bellotti* v. *Baird,* 443 U.S. 622 (1979).* The state is simply "too crude an instrument to become an adequate substitute for flesh and blood parents." J. Goldstein, A. Freud & A. Solnit, *Before the Best Interests of the Child* 12 (1979).**

Where a particular child is considered "adoptable," the state may favor termination of parental rights regardless of an individual child's peculiar interests, both because termination assists in satisfying the demand for "adoptable" children and because it relieves the state from the financial burden of providing either institutional and foster care or public services that might be necessary for the reinforcement or rehabilitation of the child's natural family. Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings,* 11 Harv. C.R.-C.L. L. Rev. 564, 575 (1976). However, since adoption is not a realistic expectation for many children who become wards of the state, other forms of custodial care, such as institutionalization, must be utilized,

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* The parental role in teaching and guiding children to become responsible adults "in large part, is beyond the competence of impersonal political institutions." *Bellotti* v. *Baird,* 443 U.S. at 638.

** Generally, *Amicus* agrees with many of the concepts contained in the Goldstein, Freud and Solnit work. Based on its extensive experience in the representation of children, however, *Amicus* finds the Goldstein, *et al.,* position that the child should only be entitled to independent counsel after the fact-finding stage to be unrealistic and mistaken.

often with unfortunate, even disastrous consequences.* Similarly, long-term foster care, which is the state's principal alternative resource, can never replace nurturing advantages lost to the child from the breakup of his natural family, and may be distinctly inimical to the needs of children. *See* Mnookin, *Foster Care—In Whose Best Interests?*, 43 Harv. Educ. Rev. 599, 605-6 (1973); *In re Jewish Child Care Ass'n* (Sanders), 5 N.Y.2d 227, 156 N.E. 2d 700, 183 N.Y.S.2d 65, (1959); *Smith* v. *Organization of Foster Families for Equality and Reform*, 431 U.S. at 856 (concurring opinion, Stewart, J.)** It is clear that although the familial environment may be adjudged deficient by predominating standards, the state's intervention, however benevolently intended, may provide equally undesirable or worse alternatives. *Alsager* v. *District Court of Polk County, Iowa*, 406 F.Supp. at 23; *In re Raya*, 255 Cal. App. 2d 260, 265, 63 Cal. Rptr. 252, 255-6 (Ct. App. 1969).

Amicus has found that independent counsel has proved to be the most effective method for minimizing the risk of an erroneous termination. In essence, practical experience demonstrates that in dependency proceedings:

> [e]ach attorney presents his arguments from the viewpoint of his client, with the child caught in the mid-

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* The state may choose to institutionalize a child, not necessarily because of his individual needs, but because there are no suitable custodial resources available. *Parham* v. *J.L.*, 442 U.S. at 625 (Brennan, J., concurring in part, dissenting in part).

The appalling conditions in some institutions and the detrimental effects of institutionalization in general upon children have been abundantly demonstrated. *New York State Ass'n for Retarded Children* v. *Rockefeller*, 357 F.Supp. 752 (E.D.N.Y. 1973); K. Wooden, *Weeping in the Playtime of Others* (1976); L. Cole, *Our Children's Keepers* (1974).

** The record in the case at bar poignantly illustrates the deficiencies of the foster care system. There was evidence that the child had been shunted by the state through a series of nine different foster homes.

> dle. . . . While each side argues in terms of the "best interests of the child," beneath this altruistic veneer lies the desire to win the case for the client—who is not the child.

Grumet, *Plaintive Plaintiffs: Victims of the Battered Child Syndrome,* 4 Fam. L. Q. 296, 314 (1970). *Accord, In re Orlando F.,* 40 N.Y.2d 103, 351 N.E.2d 711, 386 N.Y.S.2d 64 (1976).

One of the basic elements of due process is the right to be heard "in a meaningful manner." *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965). In light of the foregoing, it is clear that the child's interests cannot be adequately voiced by either of the adult parties to the action. Consequently, numerous lower courts, both federal and state,* have concluded that because of the competing interests necessarily involved in any suit affecting the parent-child relationship, the child's interest can only be effectively protected by the engagement or appointment of separate and independent counsel. *Amicus* strongly urges the adoption of this view.

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* *See, e.g., Roe* v. *Conn.,* 417 F.Supp. 769 (M.D. Ala. 1976); *Sims* v. *State Dept. of Public Welfare,* 438 F.Supp. 1179 (S.D. Tex. 1977), *rev'd on other gounds sub nom. Moore* v. *Sims,* 442 U.S. 415 (1979); *Ricketts* v. *Ricketts,* 576 S.W.2d 932 (Ark. 1979); *Wagstaff* v. *Superior Court,* 535 P.2d 1220 (Alaska 1975); *In re Orlando F.,* 40 N.Y.2d 103; *Stapleton* v. *Dauphen County Child Care Services,* 228 Pa. Super. Ct. 371, 324 A.2d 562 (1974). Cf. *In re D.,* 24 Or. App. 601, 547 P.2d 175 (Ct. App. 1976), *cert. denied sub nom. C.* v. *F.,* 429 U.S. 907 (1976).

II.

Involuntary Termination of the Constitutionally Protected Parent-Child Relationship Constitutes Such a Severe Deprivation of Liberty That Due Process Requires That the Basis for Termination Be Proven by Clear and Convincing Evidence.

Amicus submits that to satisfy the requirements of procedural due process, the standard of proof in a proceeding to terminate involuntarily and permanently the constitutionally protected parent-child relationship must be clear and convincing evidence. *Amicus'* experience in representing children in termination proceedings counsels that this standard strikes a fair and reasonable accommodation of the various interests at stake, reflects the value for the child of the preservation of the parent-child relationship, and minimizes, to an appreciable extent, the risk of an erroneous decision.

This Court has firmly established that the parent-child relationship merits constitutional protection. *See* Point I, *supra.* When the state intervenes and attempts to separate the child permanently from his parents, the child's paramount liberty interest in the family unit is jeopardized. For this reason alone, a standard of proof higher than mere preponderance of the evidence must be required in a termination proceeding.

A proceeding to terminate the parent-child relationship is simply not an ordinary civil lawsuit. Private interests of the highest magnitude are subject to adjudication. "[O]ne way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate . . . [termination] will be ordered" is to increase the standard of proof. *Addington* v. *Texas,* 441 U.S. 418, 427 (1979).

In *Addington,* this Court unanimously rejected, on due process grounds, the use of the preponderance of the evidence standard in the context of an individual's involuntary civil commitment to a state mental institution. *Addington's* holding and rationale apply with equal, if not greater, force to a proceeding directed at terminating the parent-child relationship.

Just as civil commitment entails a "significant deprivation of liberty," so does termination of the parent-child relationship. *Addington* v. *Texas,* 441 U.S. at 425. In fact, termination "is even more final than involuntary commitment or delinquency proceedings." *State* v. *Robert H.,* 20 N.H. 90, 393 A.2d 1387, 1389 (1978).* Termination of the parent-child relationship has been aptly described as "an extreme intervention into family integrity," *In re J.L.B.,* 594 P.2d at 1134, "as drastic and permanent an action as can be taken," *Blakey* v. *Blakey,* 72 Ill. App. 3d at 947, 391 N.E.2d 545, and a "drastic, final step which, when improvidently employed, can be fraught with danger," *Alsager* v. *District Court of Polk County, Iowa,* 406 F.Supp. at 24.

Cognizant of the fundamental rights involved in a termination proceeding, an increasing number of jurisdictions have required that the evidence supporting termination must be established by, at least, clear and convincing evidence. *In re G.M.,* [1980] 6 Fam. L. Rep. 2349 (Tex. Mar. 19, 1980);** *In re C.L.T.,* 597 P.2d 518 (Alaska 1979); *In re Souza,* 204 Neb. 503, 283 N.W.2d 48 (1979); *Blakey* v. *Blakey,* 72 Ill. App. 3d 946, 391 N.E.2d 545; *In re J.A.,* 283

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* In juvenile delinquency adjudications the standard of proof is beyond a reasonable doubt. *In re Winship,* 397 U.S. 358 (1970).

** *In re G.M.* is especially instructive because, relying expressly on *Addington,* the Texas Supreme Court held that the clear and convincing evidence standard of proof is required in all proceedings seeking involuntary termination of the parent-child relationship.

N.W.2d 83 (N.D. 1979); *In re J.L.B.*, 594 P.2d 1127; *In re Kelley*, 262 N.W.2d 781 (Iowa 1978); *In re Rosenbloom*, 266 N.W. 2d 888 (Minn. 1978); *In re Heidi T.*, 87 Cal. App. 3d 864, 151 Cal. Rptr. 263 (Ct. App. 1978); *State* v. *Robert H.*, 20 N.H. 90, 393 A.2d 1387 (beyond a reasonable doubt); *In re Angelia M.P.*, [1980] 6 Fam. L. Rep. (BNA) 2490 (Cal. Ct. App. May 1, 1980) (beyond a reasonable doubt); *Alsager* v. *District Court of Polk County, Iowa*, 406 F.Supp. at 25,*aff'd on other grounds* 545 F.2d 1137, *Sims* v. *State Dept. of Public Welfare*, 438 F.Supp. at 1194, *rev'd on other grounds sub nom. Moore* v. *Sims*, 442 U.S. 415.*

The standard of proof "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington* v. *Texas*, 441 U.S. at 423. There can be no doubt that both the parent and the child have a significant interest in preventing the erroneous termination of this fundamental human relationship. Since the harm to the child and the parent resulting from an erroneous termination of their relationship is significantly greater than any conceivable harm to the state, the possibility of error must be reduced. Thus, in a termination proceeding the child and parent should not be required to share equally with the state the risk of error. Moreover, the gravity of an improvident termination decision is underscored by the fact that, unlike an initial erroneous decision to commit an individual to an institution, which may be corrected when the individual's case is periodically reviewed by the professional staff, the

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* See also *In re Sego*, 82 Wash. 2d 736, 513 P.2d 831 (1973); *Huey* v. *Lente*, 85 N.M. 597, 514 P.2d 1093 (1973); *In re Adoption of J.S.R.*, 374 A.2d 860 (D.C. 1977); *In re Guardianship of R.*, 155 N.J. Super. 186, 382 A.2d 654 (Super. Ct. App. Div. 1977); *In re Hambelton*, 2 K.A. 2d 68, 574 P.2d 982 (Ct. App. 1978).

decision to terminate the parent-child relationship permanently and irrevocably destroys the family unit. *Cf. Addington* v. *Texas,* 441 U.S. at 428-429. Under these circumstances, the standard of proof in a termination proceeding must be equal to the standard required in civil commitment cases.*

Amicus maintains that the state's interest in protecting the welfare of children can be effectively furthered if the standard of proof in termination proceedings is more stringent than the ordinary civil standard of preponderance of the evidence.** Moreover, despite articulating benevolent motives, the state has often been charged with exceeding its authority in supervising the parent-child relationship and in reorganizing family units. *See, e.g.,* Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards,* 27 Stan. L. Rev. 985 (1975); Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights,* 28 Stan. L. Rev. 625 (1976).

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* In other civil contexts where substantial individual interests were at stake, this Court has required a standard of proof higher than preponderance of the evidence. See, *e.g., Woodby* v. *Immigration and Naturalization Service,* 385 U.S. 276 (1967) (deportation); *Chaunt* v. *United States,* 364 U.S. 350 (1960) (denaturalization); *Schneiderman* v. *United States,* 320 U.S. 118 (1943) (denaturalization). But see *Vance* v. *Terrazas,* —— U.S. ——, 100 S.Ct. 540 (1980) (expatriation).

** Indeed, most recently, a California appeals court, in holding that the beyond a reasonable doubt standard was to be employed in termination proceedings, observed that "[t]he burden, though heavy, is manageable. . . . In all too many cases it is a burden that will easily be met. In unclear cases substantive due process requires that the relationship of parent and child be secure." *In re Angelia M.P.,* [1980] 6 Fam. L. Rep. (BNA) at 2492.

In addition, termination proceedings have been criticized on the grounds that the parent-child relationship was severed abruptly in order to supply the adoption market's demand for young children, and because following termination children would spend many years in state institutions or foster-care placements. Crouch, *International Convention Efforts and the Current Status of Children's Rights in the U.S.A.*, [1980] 6 Fam. L. Rep. (BNA) 4023, 4025 (May 13, 1980). Moreover, termination proceedings have been attacked on the basis of cultural and class prejudice.* *Cf. Smith* v. *Organization of Foster Families for Equality and Reform*, 431 U.S. at 833-34 (foster care).

Therefore, it is critical to the child's interests as well as the parent's interests that the state meet a high standard of proof in a proceeding to terminate the parent-child relationship. To safeguard the integrity of the family unit and to prevent the unjustified destruction of the parent-child relationship, the standard of proof in a termination proceeding must be clear and convincing evidence.

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* In enacting the Indian Child Welfare Act, 25 U.S.C. §§ 1901 *et seq.* (1978), Congress found that many of these same evils existed in child custody proceedings involving Indian families. As a result, Congress required that in a proceeding to terminate the parent-child relationship the evidence supporting termination be established beyond a reasonable doubt. 25 U.S.C. § 1912(f).

III.

The Delaware Statute Allowing Termination of Parental Rights on the Grounds of Unfitness and Best Interests of the Child Is Unconstitutionally Vague and Overbroad.

The parent-child relationships of the five minor children in the case at bar were terminated on the basis of a Delaware statute allowing such termination when the parents have been found "not fitted to continue to exercise parental rights" and when it is in the "best interests" of the children. 13 Del. Code §§1103(4), 1108(a). No explication of these terms or criteria is provided by the statute. Nor have the Delaware courts provided a limiting construction or clarification, except to provide that "not fitted" connotes "unfitted for parental duties." *In re Five Minor Children,* 407 A.2d 198, 199 (Del. 1979); *In re Dingee,* 328 A.2d 139 (Del. 1974). *Amicus* joins with appellants in their contention that the Delaware statute, even as thus construed, is constitutionally infirm on the grounds of vagueness and overbreadth.

As discussed in Point I, *supra,* minors possess a fundamental liberty interest in the preservation of the family unit and in family autonomy, independent of the interests of both their parents or guardians and the state. Critical to juveniles' effective exercise of their due process rights in the termination context is the need for sufficient statutory specificity, notwithstanding the flexibility recognized to be necessary in the domestic relations context. *Amicus* thus contends that the invocation of a vague, overbroad termination statute, which is susceptible to arbitrary application, such as the Delaware statute at issue in the present case, is violative not only of the constitutional rights of the parents but of the children as well.

In order for a statute to be sustained against a challenge of unconstitutional vagueness, this Court has identified three constitutional minima that must be satisfied. First, as held by this Court in the seminal case of *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926), the statute must not be "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its applications." This is critical, regardless of whether the statute is civil or penal in nature. *A.B. Small* v. *American Sugar Refining Co.*, 267 U.S. 233 (1925). *See also Giacco* v. *Pennsylvania*, 382 U.S. 399, 402 (1966). The statute must therefore give "fair warning" of what is prohibited, so as not to "trap the innocent." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972). *See also Hynes* v. *Mayor and Council of Oradell*, 425 U.S. 610, 621 (1976).

In the child-protective area, standards such as the general unfitness and best interests of the child standards embodied in the Delaware termination statute have been held to be unconstitutionally vague precisely because of the risk of "multifarious interpretation" and inadequate notice *see, e.g., Roe* v. *Conn*, 417 F.Supp. 769.* Relying on *Grayned* v. *City of Rockford*, the court in the child-neglect case of *Roe* v. *Conn*, 417 F.Supp. at 780, rejected a "welfare" standard equally as vague as that in the case at bar. The court concluded:

> When is a home an "unfit" or "improper" place for a child? Obviously, this is a question about which men and women of ordinary intelligence would greatly

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* See also Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 Stan. L. Rev. at 649, 688-700; Note, *The Fundamental Right to Family Integrity and Its Role in New York Foster Care Adjudication*, 44 Brooklyn L. Rev. 63, 87 (1977); Note, Parens Patriae *and Statutory Vagueness in the Juvenile Court*, 82 Yale L.J. 745, 746-7 (1973).

> disagree. Their answers would vary in large measure in relation to their differing social, ethical, and religious views. Because these terms are too subjective to denote a sufficient warning to those individuals who might be affected by their proscription, the statute is unconstitutionally vague.

See also Alsager v. *District Court of Polk County, Iowa,* 406 F.Supp. at 17-18;* *Linn* v. *Linn,* 205 Neb. 218, 286 N.W.2d 765 (1980) ("best interests"); *Davis* v. *Smith,* 583 S.W.2d 37 (Ark. 1979) ("proper home").

Second, and perhaps more significant from the minor's point of view, is the requirement that a statute provide sufficiently "explicit standards" for those who apply it to ensure against "arbitrary and discriminatory enforcement" on an "*ad hoc* and subjective basis." *Grayned* v. *City of Rockford,* 408 U.S. at 108-109. *See also Hynes* v. *Mayor and Council of Oradell,* 425 U.S. at 623; *Cramp* v. *Board of Public Instruction,* 368 U.S. 278 (1961).

This stricture is particularly critical in the "highly subjective context of determining an approved mode of child-rearing."** *Alsager* v. *District Court of Polk County, Iowa,*

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* In *Alsager,* the Eighth Circuit ruled the parental rights termination statute at issue unconstitutional as applied, without expressly resolving the issue of facial vagueness. The court abstained to allow the Iowa courts to accord the statute a "plainly desirable limiting construction." 545 F.2d at 1138. Nevertheless, the court held that "at minimum . . . both the vagueness and overbreadth attacks [on the statute] . . . are serious ones", *id.,* leaving unchallenged the reasoning of the District Court.

** See generally M. Guggenheim & A. Sussman, *The Rights of Parents* (unpub. manuscript, Avon Books 1980); *Developments in the Law: The Constitution and The Family,* 93 Harv. L. Rev. at 1215 (1980); Note, *The Fundamental Right to Family Integrity and Its Role in New York Foster Care Adjudication,* 44 Brooklyn L. Rev. at 64; Note, *The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Ter-*

406 F.Supp. at 18-19; *Linn* v. *Linn*, 205 Neb. 218, 286 N.W.2d at 769; *Davis* v. *Smith*, 583 S.W.2d at 42. As the *Alsager* court noted:

> The termination of the parent-child relationship in any given case may thus turn upon which state officials are involved in the case, rather than upon explicit standards reflecting legislative intent.

406 F.Supp. at 18-19. Vague standards such as unfitness and best interests endow state officials as *parens patriae* with unfettered discretion to the detriment of both child and parents. Goldstein, *et al., Before the Best Interests of the Child* 13-14, 17. *Amicus'* experience reveals that this type of official discretion permits discrimination against poor, minority and other disfavored families.

Third, and most central to children's exercise of their independent liberty interests in family integrity, life and freedom from harm is the requirement that a statute not be so overbroad as to impinge upon fundamental constitutional rights or to punish constitutionally protected conduct.* In essence, the fundamentality of rights at stake has been held to require a more rigorous degree of scrutiny than challenges to statutes solely on notice and arbitrary enforcement grounds, essentially causing the state to as-

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mination Proceedings, 68 Geo. L. J. 213, 240 (Oct. 1979); Chemerinsky, *Defining the Best Interests: Constitutional Protections in Involuntary Adoptions*, 18 J. of Fam. L. 79, 110 (1979).

* This stricture was first recognized in cases where fundamental First Amendment freedoms were at stake. See, *e.g.*, *Grayned* v. *City of Rockford*, 408 U.S. at 108-109; *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614 (1971); *Baggett* v. *Bullit*, 377 U.S. 360, 368 (1964). See generally Day, *Termination of Parental Rights Statutes and the Void for Vagueness Doctrine: A Successful Attack on the* Parens Patriae *Rationale*, 16 J. of Fam. L. 213, 218 (1977).

sume the burden of demonstrating that no overreaching is involved. *See Hynes* v. *Mayor and Council of Oradell,* 425 U.S. at 621; *Rose* v. *Locke,* 423 U.S. 48, 50 n. 3 (1975); *Smith* v. *Goguen,* 415 U.S. 566, 572-3 (1974).

The concept has been recognized in *Alsager* v. *District Court of Polk County, Iowa,* 406 F.Supp. at 18-19, *aff'd as modified,* 545 F.2d 1137, that the danger of an overbroad or vague statute in this context is that it can inhibit the exercise of the "fundamental right to family integrity." *See also Roe* v. *Conn,* 417 F.Supp. at 777, 779; *Linn* v. *Linn,* 205 Neb. 218, 286 N.W.2d at 768; *Davis* v. *Smith,* 583 S.W.2d at 40. An overbroad statute impinging upon this right, therefore, encroaches upon the child's as well as the parent's constitutionally based right to family autonomy.

This rigorous degree of scrutiny necessitates that state intrusions into family life can only be justifiable by a compelling state interest in protecting the child from serious and concrete harm, and only then if less drastic forms of rehabilitative intervention have already been tried or are futile.* The court below properly recognized that termination of the parent-child relationships in the case at bar could not be justified solely upon the basis of "best interests" or by reason of the parents' poverty or lifestyle. *In re Five Minor Children,* 407 A.2d at 199.** Nev-

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* See generally Goldstein, *et al., Before the Best Interests of the Child* 5, 9, 18; Chemerinsky, *Defining the Best Interests: Constitutional Protections in Involuntary Adoptions,* 18 J. of Fam. L. at 105; Note, *The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings,* 68 Geo. L. J. at 235 (specifically criticising the failure of the Delaware termination statute at issue to mandate consideration of less destructive dispositions). *Cf.* California Family Protection Act of 1976 (1976 Cal.Stats. § 977); N.Y. Soc. Serv. Law § 384-b (McKinney Supp. 1979-80).

** See also *Quilloin* v. *Walcott,* 434 U.S. 246 (1978) [citing *Smith* v. *Organization of Foster Families for Equality and Reform,* 431 U.S. at 856 (concurring opinion, Stewart, J.)]. Several

ertheless, the Court's coupling of the unfitness and best interests standards fails to cure the statute of unconstitutional overbreadth, where no guidelines for the application of either standard have been provided.

Surely, any intrusion into family life must be necessitated by, and be only in direct proportion to, the state's interest in protecting children.* Moreover, while "[m]athematical certainty," and "meticulous specificity or great exactitude" in familial-rights termination statutes would be unnecessary in light of the "[f]lexibility and reasonable breadth" desirable in the child welfare context, *Davis* v. *Smith,* 583 S.W.2d at 42, objective guidelines should be established. The guidelines should focus on the effects of parental conduct upon children, not merely upon the conduct. Intervention should be allowed only to prevent actual or imminent serious harm to children. Moreover, intervention should only be permitted to the extent to which the risk of harm can be decreased.** Most important,

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state courts as well have held that termination of parental rights may not rest on considerations of best interests alone. See, *e.g., In re Sanjivini K.*, 47 N.Y.2d 374, 391 N.E.2d 1316, 418 N.Y.S.2d 339 (1979); *Corey L.* v. *Martin L.*, 45 N.Y.2d 383, 380 N.E.2d 239, 408 N.Y.S.2d 439 (1978); *In Re Fish*, 569 P.2d 924 (Mont. 1977); *In re La Rue,* 244 Pa. Super. Ct. 218, 366 A.2d 1271 (1976); *Westerlund* v. *Croaff,* 68 Ariz. 36, 198 P.2d 842 (1948). Moreover, several courts have required consideration of less detrimental alternatives. See, *e.g., In re Carmelita B.*, 21 Cal. 3d 482, 496, 579 P.2d 514, 523, 146 Cal. Rptr. 623 (1978); *In re LaRue,* 244 Pa. Super. Ct. 218, 366 A.2d 1271.

* See generally Note, *Constitutional Limitations on the Scope of State Child Neglect Statutes,* 79 Colum. L. Rev. 719, 727 (May, 1979).

** See generally, Goldstein, *et al., Before the Best Interests of the Child* 16, 59, 72, 91; *Developments in the Law: The Constitution and the Family,* 93 Harv. L. Rev. at 1318-19; Wald, *State Intervention on Behalf of Neglected Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights,* 28 Stan. L. Rev. at 688-700.

statutory guidelines should conform to the constitutional minima discussed above — that is, definitional precision should be embodied so as to give sufficient notice of proscribed conduct, to guard against arbitrary and discriminatory enforcement, and to prevent overreaching into the protected realm of family life.

In summary, the Delaware termination statute at issue in the present case meets none of these constitutional minima. Without further delineation, neither "unfitness" nor "best interests" is sufficiently precise to provide adequate warning of unacceptable behavior or sufficiently objectified to guard against enforcement on the basis of an official's individual child-rearing preferences. The harms to children to be prevented are not spelled out; nor is there any mandate to use any alternative short of the drastic step of parent-child rights termination. As such, the statute impinges upon both the children's and the parents' exercise of vital constitutional rights and should, therefore, be rejected as unconstitutionally vague and overbroad.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully urges this Court to declare the Delaware termination of parental rights statute unconstitutional, to hold that the Delaware Court's use of the preponderance of the evidence standard in termination proceedings is unconstitutional, and to remand the case for a new hearing at which counsel for the children would be mandated.

Dated: Brooklyn, New York
June 7, 1980

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